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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

JOHN R. AND AUDREY PERTUIT,

Petitioners,

versus

THE AMERICAN BANK

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT, STATE OF LOUISIANA AND MOTION TO VACATE THE JUDGMENT BELOW

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30 pp

QUESTION PRESENTED

Article 2404 of the Louisiana Civil Code granted the husband, as "head and master" of the community, the unilateral right to encumber and sell jointly owned property without the wife's knowledge or consent. *Kirchberg v. Feenstra*, 450 U.S. 455, 67 L.Ed.2d 428, 101 S.Ct. 1195 (1981), held Article 2404 to be in violation of the Equal Protection Clause of the Fourteenth Amendment. The mortgage on Mrs. Feenstra's property, executed in 1974, was declared null.

The question in this case is whether a mortgage on community property executed in Louisiana by a husband alone on February 11, 1977, is enforceable when it had been challenged on an equal protection basis at the time Article 2404 was declared unconstitutional.

PARTIES

John R. and Audrey Pertuit, husband and wife, are individuals who reside and are domiciled in the Parish of St. Charles, State of Louisiana.

The American Bank is a banking corporation organized and existing under the laws of the State of Louisiana, and is domiciled in the Parish of St. Charles, State of Louisiana.

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JOHN R. AND AUDREY PERTUIT,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT, STATE OF LOUISIANA AND MOTION TO VACATE THE JUDGMENT BELOW

The petitioners, John R. and Audrey Pertuit, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal, entered in this proceeding on February 9, 1987, and move this Honorable Court to vacate that judgment.

OPINION BELOW

The opinion of the Court of Appeal, Fifth Circuit, State of Louisiana, appears as Item 2 in the Appendix hereto. The judgment of the 29th Judicial District Court, Parish of St. Charles, State of Louisiana, appears in the Appendix as Item 1, and the writ denial by the Supreme Court of Louisiana appears as Item 3.

JURISDICTION

The decision of the Court of Appeal, Fifth Circuit, State of Louisiana, was rendered on February 9, 1987 (503 So.2d 154). A Petition for Writ of Certiorari was timely filed with the Supreme Court of Louisiana, but was denied on March 26, 1987 (503 So.2d 1008). This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3). The federal questions of petitioner's equal protection and due process rights being violated and the appropriate application of this Court's decision in *Kirchberg v. Feenstra*, 609 F.2d 727 (5th Cir. 1979), affirmed 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981), were raised at the trial level in the 29th Judicial District Court, as well as in the Court of Appeal, Fifth Circuit, State of Louisiana and the Supreme Court of Louisiana.

STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION, Amendment XIV.

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LOUISIANA CIVIL CODE, ARTICLE 2404

The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the community property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud. (Repealed by Louisiana Act 627 of 1978, Louisiana Act 709 of 1979)

STATEMENT OF THE CASE

In 1974, Harold Feenstra signed a promissory note and a mortgage on community property. Joan Feenstra, his wife, was not informed of and did not consent to the mortgage on her property, pursuant to Article 2404 of the Louisiana Civil Code, which provided that the husband is the "head and master" of the community and may administer the community and alienate its assets "without the permission of his wife." In 1976, the holder of the note and mortgage sued Mrs. Feenstra, who answered by challenging the constitutionality of Article 2404. On December 12, 1979, the United States Court of Appeals for the Fifth Circuit found that article to be in violation of the Equal Protection Clause of the Fourteenth Amendment, and declared the mortgage at issue to be null and void, 609 F.2d 727. That decision was affirmed by this Court at 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981).

The case at hand began on February 11, 1977, when John R. Pertuit and his corporation, Red Diamond Supply Co., Inc. ("Red Diamond") executed a promissory note in the amount of $94,064.00. This note was secured by a mortgage, signed by Mr. Pertuit only, on immovable property standing in the names of John R. and Audrey Pertuit and owned by the community of acquets and gains existing between them. Mrs. Pertuit was not informed of and did not execute or consent to the execution of the mortgage on the family home.

On April 4, 1978, respondent American Bank filed suit against Mr. Pertuit and Red Diamond to recover $94,064.00 as holders of the promissory note. Mrs. Pertuit was not named as a defendant, nor was her inclusion in the proceedings permitted under then-existing law. A trial was held on October 10, 1979, with judgment in favor of American Bank being rendered on November 12, 1979.

Mr. Pertuit and Red Diamond appealed to the Court of Appeal, Fourth Circuit, State of Louisiana. Mrs. Pertuit, now aware that her interest in the family home was threatened, attempted to intervene in the proceedings, but was denied permission to do so because, under the law then existing, she had no right to intervene in the trial court. On July 7, 1981, the court affirmed the decision of the trial court (402 So.2d 729), and application for rehearing was denied. Writs to the Louisiana Supreme Court were refused on December 14, 1981 (407 So.2d 747).

On July 11, 1985, American Bank secured a writ of *fieri facias*, directing the Sheriff of St. Charles Parish to seize the community immovable pursuant to the mortgage. Mr. and Mrs. Pertuit filed a petition for writ of injunction, which was granted by the trial court as to Mrs. Pertuit and denied as to Mr. Pertuit. American Bank's application for writs of certiorari and mandamus to the Court of Appeal, Fifth Circuit, State of Louisiana, was denied on May 8, 1986, as untimely.

On June 12, 1986, American Bank moved for summary judgment against the petitioner, Mrs. Pertuit, which motion was denied on December 22, 1986. On January 6, 1987, American Bank applied for certiorari in the Court of Appeal, Fifth Circuit, State of Louisiana, and writs were granted. On February 9, 1987, that court reversed the judgment of the trial court and held that American Bank was entitled to summary judgment. It stated that *Kirchberg v. Feenstra*, 609 F.2d 727 (5th Cir. 1979), affirmed 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981), is not intended to apply to promissory notes and mortgages executed prior to the date of decision (December 12, 1979) and therefore American Bank was entitled to enforce the mortgage against both Mr. Pertuit's and Mrs. Pertuit's shares of the community property. 503 So.2d 154 (La. App. 5th Cir. 1987).

The Louisiana Supreme Court denied writs on March 26, 1987. 503 So.2d 1008 (La. 1987).

REASONS FOR GRANTING THE WRIT

Old habits die hard. So, too, do old rules of law. The death of Article 2404 of the Louisiana Civil Code was a slow and lingering one, causing confusion for Louisiana's legislature, courts and citizens. The effect of that article (now held unconstitutional and repealed), providing that the husband is the "head and master" of the community, continues to present issues in the courts.

Prior to the demise of Article 2404, a husband could alienate or encumber the community's immovable property without the wife's knowledge or consent, except in the rare case where the wife filed a written declaration requiring her consent. Countless wives suffered the loss of assets they had worked to acquire, when their husbands acted unilaterally to sell or mortgage their property.

Mr. Pertuit executed a promissory note and mortgaged the community home without Mrs. Pertuit's consent. When the holder sued to enforce the note and mortgage, Mrs. Pertuit had no right under the law as it then existed to be a party to the action and dispute the validity of the mortgage on her property. Her attempts to intervene were rebuffed. Her husband, who was a defendant, did challenge the constitutionality of the obligation, and that suit was pending when *Kirchberg v. Feenstra*, *supra*, was decided. Under well-recognized precedent, Mrs. Pertuit should have the benefit of the rule established in that suit.

> **The rule announced in *Kirchberg v. Feenstra*, *supra*, applies to cases not yet final at the time of its rendition, and is not purely prospective in nature so as to permit enforcement of mortgages executed pursuant to an unconstitutional law against the community property interests of wives who did not consent to the mortgage of their property.**

In *Kirchberg, supra*, this Court affirmed the United States Court of Appeals for the Fifth Circuit which held that Article 2404 of the Louisiana Civil Code violated the equal protection and due process guarantees of the Fourteenth Amendment. In that case, the mortgage at issue, executed without the wife's consent, was declared null and void. While this Court declined to rule on mortgages other than the single mortgage at bar, 450 U.S. at 462, the Fifth Circuit said in *dictum* that its application was to be prospective and quoted with approval this court in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374, 60 S.Ct. 317, 318-319, 84 L.Ed. 329 (1940).

The first major pronouncement of this Court relating to retroactivity in a civil matter was that of Chief Justice Marshall in the *United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801), that:

> It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not, but if ***subsequent to the judgment and before the decision of the appellate court***, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . .If it be necessary to set aside a judgment . . . which cannot be affirmed but in violation of law, the judgment must be set aside.
> At 110, 2 L.Ed. at 51. (emphasis added)

See also, *Carpenter v. Wabash R.R. Co.*, 309 U.S. 23, 60 S.Ct. 416, 84 L.Ed. 558 (1940); *United States v. Chambers*, 291 U.S. 217, 54 S.Ct. 434, 78 L.Ed. 763 (1934); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 61 S.Ct. 347, 85 L.Ed. 327 (1941).

The general rule is that judicial decisions are to be given retroactive effect. Application of a decision in a prospective manner is an exception to that rule. *EEOC v. Texas Industries, Inc.*, 782 F.2d 547 (5th Cir. 1986); *EEOC v. Atlanta Gas Light Co.*, 751 F.2d 1188 (11th Cir. 1985). In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), this Court announced three factors to be considered in deciding whether nonretroactive application is appropriate:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied, see, e.g., *The Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 20 L.Ed.2d at 1243, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen v. State Board of Elections*, 22 L.Ed.2d at 20. Second, it has been stressed that "we must. . .weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, 14 L.Ed.2d at 608. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma*, 23 L.Ed.2d at 652.
>
> *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296, 306 (1971).

Applying each of these factors to the case at bar leads to the conclusion that retroactivity is appropriate with respect to those cases which were pending but not yet final when *Kirchberg* was announced.

First, a new principle of law was established by overruling past precedent. However, on July 12, 1978, the Louisiana Legislature passed Act 627, repealing Article 2404, to take effect January 1, 1980. (Act 627 of 1978 was repealed and replaced by Act 709 of 1979; however, the repeal of Article 2404 remained.) The legislative amendments to the community property scheme were widely reported and the subject of much public discussion. It would be disingenuous to assert that a bank which daily entered into mortgages and notes was unaware of the impending legislative change. Further, the decision in *Kirchberg* was announced in December, 1979, after the 1979 legislative session and some twenty days prior to the effective date of Act 709. It cannot be said that the respondent here was justified in relying on the prior law. The change in the law was "clearly foreshadowed." The first factor of the *Huson* case favors retroactivity.

Second, retrospective operation of *Kirchberg*, limited to cases not yet final at the time of its announcement, will further the goal sought to be achieved by the change in the law. Both the legislature and the courts realized that Article 2404 was unconstitutional and they sought to give wives equal control over the management of their property and to prevent the divestment of that property without due process. Such limited retrospective application will not "wreak havoc" on all mortgages lacking the wife's consent. It will apply the *Kirchberg* rule only to those mortgages already facing judicial challenge at the time *Kirchberg* was announced.

Third, substantial inequitable results will not accrue from such retrospective application. Indeed, substantial inequity would result if there were not retroactive application to those decisions not yet final at *Kirchberg*. Those challenging the validity of mortgages and their enforcement at the same time and on the same grounds as Mrs. Feenstra should, in the interest of justice, be permitted the same relief permitted to her. The third factor of *Huson* also favors, at least, a limited retroactivity to protect wives actively challenging Article 2404 when *Kirchberg* was decided.

The presumption in favor of retroactivity can be overcome only by a clear finding that all three *Huson* factors require prospective application. In *Camden I. Condominium Association, Inc. v. Dunkle*, 805 F.2d 1532 (11th Cir. 1986), the third *Huson* factor was carefully examined. That decision concerned the application of *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), which declared unconstitutional a Florida statute by which interest earned on all funds deposited in court registries was deemed to be income of the office of the clerk of each court. In *Camden I., supra*, the Eleventh Circuit found that the existence of some potential economic hardship is insufficient to overcome the presumption in favor of retroactive application. It stated:

> The party seeking to avoid retroactive application has the burden of persuasion [citations omitted] . . . Retroactive application is precluded only when necessary to prevent ***substantial*** inequity. *Williams v. City of Atlanta*, 794 F.2d 624, 628 (11th Cir. 1986); *cf. Acoff v. Abston*, 762 F.2d 1543, 1548 n. 6 (11th Cir. 1985.
> 805 F.2d at 1534, 1535 (emphasis in original)

Petitioners suggest that the burden of persuasion has not been met. Only insubstantial economic harm, if any, would result from retroactive application of *Kirchberg*. The serious inequities would fall on Mrs. Pertuit, who stands to lose her home if at least a limited retroactivity is denied.

This Court has provided guidance to the lower courts that intervening changes in the law are to be given effect to cases in which the opportunity for judicial review remains extant, and on the application of the *Huson* test to make a determination on retroactivity. The circuit courts of appeal have repeatedly been called upon to decide such matters in recent years, being guided by those principles. Gender discrimination cases such as this one have received repeated consideration.

In *Edwards v. Heckler*, 789 F.2d 659 (9th Cir. 1985), it was held that a new standard for allocation of self-employment income in a husband-wife business, for purposes of Social Security retirement benefits, was to applied retroactively to the beginning of the Social Security self-employment program in 1950. The court cited the *Huson* test and found retroactive application appropriate after considering all three factors, and after noting the particularly odious gender discrimination issues involved. The Secretary of Health & Human Services had based her argument on 42 U.S.C. §411(a)(5)(A), which provided that income from a husband-wife business, for Social Security purposes, was to be allocated entirely to the *husband*, unless the wife could demonstrate that she exercised substantially all of the management and control of the business. In agreeing with the district court that the section violated the Equal Protection Clause of the Fifth Amendment, the Ninth Circuit quickly disposed of objections to retroactive application:

> First, the ***strong line of gender discrimination cases decided by the Supreme Court*** in the

> last decade "clearly foreshadowed" the holding that [the section] was unconstitutional. Second, retroactive application will further the purpose of the new partnership-in-fact standard to ***eliminate the effect of the unconstitutional presumption in favor of the husband*** and to permit both spouses to participate in the Social Security program . . . Third, a balancing of the equities favors retroactive application.
> 789 F.2d at 663. (emphasis added)

The relief sought by Mrs. Pertuit is less extensive than that awarded to the wives in *Edwards v. Heckler, supra.* While *Edwards* was applied to all affected wives retroactively to 1950, Mrs. Pertuit asks for relief only for those wives whose property, mortgaged without their consent pursuant to an unconstitutional law, was the subject of active judicial challenge at the time *Kirchberg* was decided.

In two decisions construing the retroactivity of *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983), the Fifth and Eleventh Circuits found that the rule of law, on disparate levels of pregnancy-related health insurance benefits for female employees and the spouses of male employees, was retroactive to the date of passage of the Pregnancy Discrimination Act, 42 U.S.C. §2000e(k), rather than to the date of decision in *Newport News.* In *EEOC v. Atlanta Gas Light Co.*, 751 F.2d 1188 (11th Cir. 1985), the court found all three prongs of the *Huson* test met. The result reached was, in fact, "clearly foreshadowed" not only by the prior judicial pronouncements on pregnancy-related benefits, but by the legislative history and discussion of the Pregnancy Discrimination Act. The court noted that retroactive relief is normally awarded in

Title VII cases in order to promote the purpose of correcting the effects of unconstitutional and unlawful gender discrimination. In addition, there was no evidence to indicate that retroactive application would produce devastating results in the financial stability of employee benefit plans.

An identical result was reached on strikingly similar facts in *EEOC v. Texas Industries, Inc.*, 782 F.2d 547 (5th Cir. 1986), in which *Atlanta Gas, supra*, was cited with approval on all three points of the *Huson* test.

These three cases, in which gender alone was the basis for discrimination, fully illustrate the wisdom of at least a limited retroactive application of *Kirchberg*. *Edwards v. Heckler, supra*, demonstrates the economic harm done to wives based on the historic paternalism of the law, and on the unlawful and baseless assumptions made as to the role of a wife in a marriage and in society. It provides guidance in fashioning relief that will, to some extent, correct the injustices done to these wives by protecting their property - the tangible results of years of work by the wives.

Petitioners note that a limited retrospective application of *Kirchberg* would not nullify all mortgages entered in contravention of Article 2404. It would apply only to those mortgages on community property, standing in the names of both husband and wife, where the wife has not consented to the mortgage, and against which a judicial challenge was not yet final when *Kirchberg* was decided.

Invalidation of such faulty mortgages would not invalidate the underlying obligations, which may be satisfied by other means. This is precisely the issue addressed by the 29th Judicial District Court in issuing its injunction protecting from seizure only Mrs. Pertuit's interest in the community home, pursuant to a mortgage entered without her consent.

The Fifth Circuit Court of Appeals stated in *Kirchberg* that its ruling was to be applied prospectively (*dictum*). However, a purely prospective ruling would not apply even to the litigants bringing the action. This was not the case in *Kirchberg*, as this Court noted. 450 U.S. at 462-463. See also *England v. State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). Mrs. Pertuit's interest in the community property covered by the mortgage at issue was considered in all prior litigation, and the avenue of direct review was not yet closed as to that issue when *Kirchberg* was decided.

This Court was unanimous in ruling in *Reed v. Campbell*, 476 U.S. _____, 106 S.Ct. 2234, 90 L.Ed.2d 858 (1986), that the date of decision cannot be the benchmark for all purposes in determining applicability of a new rule of law. In that case, Texas courts had relied on *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), to permit succession by illegitimates in cases pending on April 26, 1977, the date of decision in *Trimble*. Reed was denied permission to participate in her father's estate because he died before, and her claim was filed after, April 26, 1977. This Court disagreed with the Texas court that Reed's claim was invalid because it was not pending when *Trimble* was decided.

Also, in *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985), this Court held that a case pending on appeal at the time *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), was decided was entitled to have the *Edwards* rule applied. In rejecting the argument that nonretroactivity was appropriate because of reliance on existing law, the Court said:

> If the *Edwards* principle is not to be applied retroactively, the only way to dispense equal

> justice to Edwards and to Shea would be a rule that confined the *Edwards* principle to prospective application unavailable even to Edwards himself.
> 470 U.S. at 60

Although reliance on existing law has been considered as one factor in determining whether application of a new rule of law is to be prospective or retrospective, it is rarely the determinative issue. Even when considered, the claimed reliance must be shown to have been well founded.

Even if the American Bank had relied on an unconstitutional statute in this matter, it could not justify such reliance. It initiated its suit to have its mortgage recognized in April, 1978. That same month, the Louisiana Supreme Court decided *Corpus Christi Parish Credit Union v. Martin*, 358 So.2d 295 (La. 1978), in which a mortgage was held valid by a divided court over a strong dissent. The three dissenting justices noted that the court had carefully avoided ruling on the constitutionality of Article 2404, and termed that avoidance "unfortunate" in light of the legislature's current revising of the community property system. The dissenters stated that Article 2404 was clearly unconstitutional and that a decision should have been held in abeyance until the legislature had completed its address of the matter. A clearer "foreshadowing" is hard to imagine.

In addition, *Kirchberg* itself had been filed some two years before American Bank instituted its action on the Pertuit mortgage. The Louisiana Legislature was preparing to open its 1978 Legislative Session at the time, when Act 627 would repeal Article 2404 of the Louisiana Civil Code.

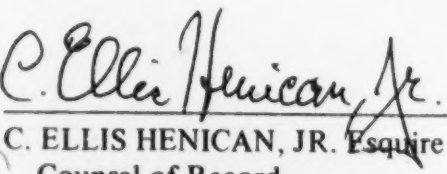
Thus, even if American Bank claimed to have relied on Article 2404, it did so with knowledge of strong judicial displeasure and of pending legislative action to repeal that article, and any reliance was unfounded.

American Bank would enforce a mortgage, requiring written consent by the wife, against the property of that wife who did not consent to the encumbrance. It seeks to rely on a discredited and repealed provision of law, to the detriment of a party unaware that her interest in the family home was in danger. It would have the courts of the State of Louisiana and of the United States hold that direct review may be foreclosed to a litigant in spite of an intervening change in the law upon which the opponent rests its claim. To so hold would deny the protection the *Kirchberg* and the Louisiana Legislature sought to provide. Limiting retrospective application of the rule of law here at issue would not produce "injustice or hardship" to holders of such faulty mortgages, in that alternate means are available by which these debts may be satisfied and the interests secured. To hold otherwise would perpetuate the unjust, discredited, and unconstitutional practices condemned by this Court.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeal, Fifth Circuit, State of Louisiana. After due proceedings, that judgment should be vacated.

Respectfully submitted:



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APPENDIX

ITEM 1

JOHN R. PERTUIT, ET AL

VERSUS

AMERICAN BANK

NO. 29,222

DIVISION "C"
29TH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES
STATE OF LOUISIANA

FILED: April 1, 1986
Dy. CLERK: s/ Betty S. Burleson

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED the exception is maintained insofar as it pertains to John R. Pertuit. It is overruled insofar as it pertains to Audrey Pertuit.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, for the reasons argued by petitioner, the rule is made absolute and the preliminary injunction shall issue as requested only insofar as it pertains to petitioner, Audrey Pertuit, and dismissed as to everyone else.

JUDGMENT RENDERED AND SIGNED at Hahnville, St. Charles Parish, Louisiana, this 1st day of April, 1986.

s/ RUCHE J. MARINO
RUCHE J. MARINO, DISTRICT JUDGE

ITEM 2

COURT OF APPEAL
FIFTH CIRCUIT
STATE OF LOUISIANA

No. 87-C-6

JOHN R. AND AUDREY PERTUIT

V.

AMERICAN BANK

FEB 12, 1987

IN RE AMERICAN BANK APPLYING FOR WRITS OF CERTIORARI, PROHIBITION AND MANDAMUS DIRECTED TO THE HON. RUCHE J. MARINO, JUDGE, DIVISION "C", 29TH JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. CHARLES, STATE OF LOUISIANA, No. 29-222

LAWRENCE A. CHEHARDY
CHIEF JUDGE

FEB 9 1987

ON WRIT GRANTED.

(Court composed of Judges Lawrence A. Chehardy, H. Charles Gaudin and Thomas C. Wicker, Jr.)

SUSHAN, MEYER, JACKSON, McPHERSON & HERZOG
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for relator.

R. O. LEWIS
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3100 U.S. HIGHWAY 90
LULING, LOUISIANA 70070
for respondent.

REVERSED AND REMANDED.

Relator seeks supervisory relief from a denial of its motion for summary judgment in relator's suit to enforce a judgment against community property. The narrow issue presented is whether *Kirchberg v. Feenstra*, 609 F.2d 727 (5th Cir. 1979), affirmed, 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981), applies to this case to preclude enforcement of the judgment against the wife's half of the community property.

The *Kirchberg* decision, which struck down the provision of the Louisiana Civil Code designating the husband as head and master of the community and which gave the husband the exclusive right to administer the community estate, was rendered on December 12, 1979. Relator's judgment was obtained on November 12, 1979 and was obtained upon default of a promissory note secured by a mortgage on community property. The note and mortgage were executed solely by the husband some years prior to 1979.

After our review, we find the *Kirchberg* court did not intend its decision to apply to notes and mortgages executed prior to its decision since the court specifically stated that it was to be applied prospectively. See also *Ailstock v. Hamiter*, 420 So.2d 500 (La. App. 2d Cir. 1982). Consequently we find *Kirchberg* does not apply to these facts and relator is entitled to enforce its judgment against both the husband and wife's half of the community property.

Accordingly, the judgment of the trial court denying relator's motion for summary judgment is hereby reversed and the case is remanded for proceedings consistent with this opinion.

REVERSE AND REMANDED.

ITEM 3

John R. PERTUIT and Audrey Pertuit

v.

AMERICAN BANK.

No. 87-CC-0491.

Supreme Court of Louisiana.

March 26, 1987.

In re Pertuit, John R.; Pertuit, Audrey; applying for writ of certiorari and/or review; to the Court of Appeal, Fifth Circuit, No. 87-C-6; Parish of St. Charles, 29th Judicial District Court, Div. "C", No. 29222.

Prior report: La.App., 503 So.2d 154.

Denied.

WEST KEY NUMBER SYSTEM

(2)

Supreme Court, U.S.
FILED
SEP 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-2053

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN R. AND AUDREY PERTUIT,
Petitioners

versus

THE AMERICAN BANK,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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No. 86-2053

In The
Supreme Court of the United States
October Term, 1987

JOHN R. AND AUDREY PERTUIT,
Petitioners

versus

THE AMERICAN BANK,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

BACKGROUND

The long saga of this case started on November 12, 1979 when the American Bank obtained a judgment on the merits after a contested trial against John R. Pertuit et als. On a note secured by a mortgage, see Appendix, Item A. The Louisiana Court of Appeal affirmed the judgment in *American Bank v. Red Diamond, et al,* 402 So.2d 729 on July 7, 1981. The Louisiana Supreme Court denied writs stating "Result is correct" on December 14, 1981 in *American Bank v. Red Diamond et al,* 407 So.2d 747 (1981). On June 3, 1985 the Louisiana Court of Appeal rejected a collateral attack in a separate suit on the Bank's judgment, see *American Bank v. Red Diamond et al,* 472 So.2d 155 (1985), and again the Louisiana Supreme Court denied writs on September 27, 1987, see *American Bank v. Red*

Diamond et al, 475 So.2d 360 (1985). This is the third related suit. On July 30, 1985 John and Audry Pertuit filed a "Petition for Writ of Injunction" seeking to enjoin the enforcement of the November 12, 1979 judgment. American's motion for summary judgment was initially denied by the district court, however, on appeal the Louisiana Fifth Circuit Court of Appeals ordered the Trial Court to grant American's motion for summary judgment, see Appendix, Item B, dismissing with prejudice Petitioner's claim. It is this dismissal of Petitioner's claim for injunctive relief that now comes before the United States Supreme Court for review.

There are no facts in dispute. The sole and only remaining issue presented by this case below is set forth in Article V of the Petitioner's First Amending and Supplemental Petition, see Appendix, Item C which states that:

> V. Petitioners aver that the American Bank obtained a judgment against communty property standing in the name of both John R. Pertuit and Audrey Pertuit as a result of a mortgage taken on the property which was signed by John R. Pertuit only. The mortgage was executed in accordance with former Civil Code Art. 2404, which was declared unconstitutional by the United States Fifth Circuit Court of Appeals in *Kirchberg v. Feenstra*, 609 F.2d (5th Cir. 1979), therefore, the judgment based on the mortgage taken pursuant to the former C.C.P. Art. 2004 is null and void with respect to the community property referred to herein.

We respectfully submit that *Kirchberg* is irrelevant to the instant case, and hence, no grounds or reasons exist to grant Petitioner's Writ.

ISSUE PRESENTED

Does the case of *Kirchberg v. Feenstra*, 450 U.S. 455, 101 S.Ct 1195, 67 L.Ed. 2d 428 (1981) provide a controlling basis for the Petitioners to prevail on the merits of this case?

ARGUMENT

We respectfully submit and show that there is no legal basis to issue the injunction sought against the enforcement of Respondent's judgment. *Kirchberg* does not provide any such basis.

Petitioners allege that the Bank's judgment is "as a result of a mortgage taken on the property." This allegation is not correct as a matter of law. The Bank's judgment is based upon a promissory note. The Louisiana Court of Appeal which affirmed the Bank's judgment stated the facts as follows:

> On April 4, 1978 plaintiff filed this suit against defendant, Red Diamond Supply Company, Inc. and John R. Pertuit, to recover $94,064, together with interest and attorney's fees, as the holder and owner of a promissory note in the amount sued upon. The note, dated February 11, 1977, was executed by both defendants. Plaintiff also prayed for recognition of: (1) a promissory note in the amount of $33,000 dated October 11, 1971, paraphed for identification with a collateral mortgage of the same date, both executed by defendant John R. Pertuit, and pledged by him to plaintiff; (2) a promissory note in the amount of $50,000 dated September 1, 1976, paraphed for identification with a collateral mortgage of the same date, both executed by defendant, John R. Pertuit, and pledged by him to plaintiff; and (3) a

> promissory note in the amount of $62,000 dated October 11, 1971, paraphed for identification with a collateral mortgage of the same date, both executed by the other defendant, Red Diamond Supply Company, Inc., and pledged by it to plaintiff.

American Bank v. Red Diamond et al, 402 So.2d 729 at 730 (1981). A mortgage is a mere accessory to a principal obligation (See Louisiana Civil Code Article 3284). The bank obtained its judgment upon the note that evidenced the principal debt and has a right to enforce that judgment and is *not* enforcing a conventional mortgage. On the other hand, *Kirchberg* held that a conventional mortgage not signed by both spouses could not be enforced by Louisiana executory process against community property. This has nothing to do with the basic underlying debt, and hence, *Kirchberg* is inapplicable to this case as a matter of law.

The issue of the application of *Kirchberg* to this case has already been finally and squarely adjudicated adversely to petitioners in the first appeal on the Bank's judgment. Judge Samuel, in *American Bank v. Red Diamond, et al*, 402 So.2d 729 at 730, 731 (1981), disposed of the issue thusly:

> Applying these principals to the present case, even if the record indicated the property secured by the collateral mortgages affected immovable property, standing in the name of both husband and wife, the execution of the hand note by the husband alone subsequent to the effective date of the amendment to Article 2334 does not violate that Article as amended. The collateral mortgages were executed at a time when it was acceptable for husband alone to mortgage or otherwise alienate community property, and the fact that the husband executed a hand note subsequent to the effective date of the amendment to Article

> 2334, by which amendment wife's signniture is required to mortgage such property, does not affect the previously recorded and pledged collateral mortgage.

Kirchberg was decided December 12, 1979 (a month after Bank's judgment was rendered by the trial court) and was expressly made prospective only from December 12, 1979; *Kirchberg v. Feenstra*, 609 F.2d 717 at 735 (1979)):

> We apply our decision today prospectively only, because a holding of retroactive invalidity of Article 2404 would create a substantial hardship with respect to property rights and obligations within the State of Louisiana.

The United States Supreme Court affirmed on March 23, 1981, which included the prospective aspect of the judgment. Justices Stewart and Rehnquist concurred and stated that:

> While it is clear that the court is correct in holding that the judgment of the Court of Appeals applied to the particular mortgage executed by Mr. Feenstra, it is equally clear that the court's explicit announcement that its holding was to apply only prospectively means that no other mortgages executed before the date of the decision of the Court of Appeals is invalid by reason of its decision.

Kirchberg v. Feenstra, 101 S.Ct 1195 at 1200 (1981).

Louisiana State Courts have consistently refused to apply *Kirchberg* to any instrument executed prior to December 12, 1979, see; *Ailstock v. Hamitar*, 420 So.2d 500 (La.App. 2d. Cir. 1982), *Cook v. White* 393 So.2d 782 (La.App. 2d. Cir. 1981)(*en banc*), as required by the United States Fifth Circuit in *Kirchberg*.

Petitioners argue that *Kirchberg* is or should be applicable to the instant case. In support Petitioners cite various cases including *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct 1731 (1985). However, nothing Petitioners cite support their claim. For example, *Linkletter* is a criminal case in which the Supreme Court held that the *Mapp v. Ohio* exclusionary rule would not be applied retrospectively. *Linkletter* simply has no relevance to the instant case.

In conclusion, the issue in *Kirchberg,* which speaks to mortgages that are potentially unconstitutional, has no pertinence to a case involving a personal judgment on a promissory note. Also, *Kirchberg's* explicit prospective application renders it inappropriate to the instant case.

CONCLUSION

For the foregoing reasons, American Bank respectfully submits that the Petition for Writ of Certiorari filed by Petitioner's should be denied.

Respectfully Submitted,

_____

_____

Rader Jackson
Donald A. Meyer
Shushan, Meyer, Jackson, McPherson & Herzog
1010 Common Street, Suite 1500
New Orleans, Louisiana 70112
Telephone: (504) 581-9444

Attorneys for Respondent
American Bank

CERTIFICATE OF SERVICE

I hereby certify that I have on this ____ day of _____, 1987, served three copies of the foregoing brief in opposition upon the following, by placing same in the United States Mail, properly addressed and first class postage prepaid:

Counsel for Petitioner,
C. Ellis Hennican, Jr.
Judith E. Deck
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Respectfully Submitted,

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Attorneys for Respondent
American Bank

APPENDIX, Item A

AMERICAN BANK	29th JUDICIAL DISTRICT COURT
versus	PARISH OF ST. CHARLES
RED DIAMOND SUPPLY CO., INC. and JOHN R. PERTUIT	STATE OF LOUISIANA
	DIVISION "B"
	NO. 18,925

JUDGMENT

This matter came on for trial this date on its merits upon regular assignment, and there were present:

RADER JACKSON	Attorney for Plaintiff
CHARLES C. WILSON	Attorney for Defendants

When after hearing the pleadings, evidence and oral argument, the Court finds the law and evidence to be in favor of the Plaintiff, for the reasons this day orally assigned, and accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, AMERICAN BANK, and against the defendants, RED DIAMOND SUPPLY CO., INC. and JOHN R. PERTUIT, jointly and in solido, in the full and true sum of Ninety-Four Thousand Sixty-Four and 00/100 ($94,064.00) Dollars, together with ten (10%) per annum interest from August 11, 1977 until paid, twenty-five (15%) per cent attorney's fees on both principal and interest, and for all Court costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Act of Collateral Mortgage passed before Leon C. Vial, III, Notary Public dated October 11,

1971, recorded St. Charles Parish MOB 156, folio 653 be recognized and maintained as security for the plaintiff on the following described property, to-wit:

> THAT PORTION OF GROUNND, together with all buildings and improvements thereon, and all rights, ways, privileges, servitudes, appurtenances and advantages thereunto belonging or in anywise appertaining, situated on the West Bank of the Mississippi River at Luling, St. Charles Parish, Louisiana, said lot is designed by the NO. EIGHT (8) on a plan of subdivision known as MONSANTO SUBDIVISION as per plan of E. M. Collier, Surveyor, dated December 20, 1957, copy of which plan is on file in the office of the Clerk of Court of this Parish for reference;
>
> Said Lot Eight (8) measuring one hundred fifty-four and 42/100 (154.42') feet front on Oak Avenue and has a depth along its southwesten boundary of Two hundred sixty-nine (269') feet, and a depth along its common boundary with Lot No. 9 of two hundred eighty-three and 08/100 (183.0'8) feet, with a width in the rear or along its western boundary facing the Paul Maillard Road of one hundred forty-five (145') feet.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Act of Collateral Mortgage passed before Leon C. Vial, III, Notary Public dated September 1, 1976, recorded St. Charles parish, Louisiana, MOB 215, folio 292 be and is recognized and maintained and as security for the plaintiff on the above described property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Act of Collateral Mortgage passed before Leon C. Vial, III, Notary Public on October 11, 1971, recorded St. Charles Parish, Louisiana, MOB 156, folio 646 be and is recognized and maintained as secruity for the plaintiff on the following described property, to-wit:

ONE CERTAIN PIECE OR PORTION OF GROUND, together with all buildings and improvements thereon, and all rights, ways, priviledges, servitudes and advantages thereunto belonging or in anywise appertaining, situated in the Parish of St. Charles, State of Louisiana, on the right decenting bank of the Mississippi River, in Section 119, Township 13 South, Range 20 East, and more particularly described as follows:

Said lot of ground begins at a point located on the common line lying between Township 13, South, Range 20 East and Township 14 South, Range 20 East, which is 171 feet east of where the common line between Sections 118 and 119 in Township 13 South, Range 20 East intersects the common line lying between Township 13 South, Range 20 East and Township 14 South, Range 20 East, from which point it extends in a direction running North 33 degrees 58 minutes East for a distance of 240.7 feet; from which point it turns in a direction running South 36 degrees 39 minutes East for a distance of 176.35 feet, where it reaches a point located on the north right-of-way line of U.S. Highway 90; from which point it turns in a southwesterly direction, following the north right-of-way line of U.S. Highway 90 for a distance of 100 feet where it reaches a point where the common line lying between Township 13 South, Range 20 East and Township 14 South, Range 20 East intersects the north right-of-way line of U.S. Highway 90; from which point it thence turns in a westerly direction, following the common line lying between Township 13 South, Range 20 East and Township 14 South, Range 20 East for a distance of 159 feet where it reaches the point of beginning. Said portion of ground conveyed herein is more fully shown on a plan of survey made by Landry Engineering Co., dated New Orleans, Louisiana, August 2, 1967, copy of

which attached to an act of sale by Mrs. Lorna Marie Laque Lauve, et al to Rumsey Rodrigue, passed before George Richard, Notary Public, on December 28, 1967, registered in COB 73, folio 578, St. Charles Parish, Louisiana.

Being the same property acquired by Red Diamond Supply Co., Inc. by purchase from Mrs. Lorna Laque Lauve, et als by act dated February 4, 1969, passed before Charles S. Lagarde, Jr., Notary Public, and duly recorded in COB 86, folio 473, St. Charles, Louisiana.

JUDGMENT read, rendered and signed in open Court at Hahnville, Louisiana this 12th day of NOV, 1979.

/s/ illegible

JUDGE

APPENDIX, Item B

JOHN R. AND AUDREY PERTUIT	:	No. 87-C-6
	:	COURT OF APPEAL
V.	:	
	:	FIFTH CIRCUIT
AMERICAN BANK	:	
	:	STATE OF LOUISIANA

: : :

IN RE AMERICAN BANK APPLYING FOR WRITS OF CERTIORARI, PROHIBITION AND MANDAMUS DIRECTED TO THE HON. RUCHE J. MARINO, JUDGE, DIVISION "C", 29TH JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. CHARLES, STATE OF LOUISIANA, No. 29-222

: : :

LAWRENCE A. CHEHARDY
CHIEF JUDGE

FEB 9 1987

: : :

ON WRIT GRANTED.

(Court composed of Judges Lawrence A. Chehardy, H. Charles Gaudin and Thomas C. Wicker, Jr.)

SHUSHAN, MEYER, JACKSON,
McPHERSON & HERZOG
RADER JACKSON
1010 COMMON STREET
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NEW ORLEANS, LOUISIANA 70112
for relator.

R. O. LEWIS
A PROFESSIONAL LAW CORPORATION
SUITE 203, ST. CHARLES PLAZA
3100 U.S. HIGHWAY 90
LULING, LOUISIANA 70070
for respondent.

REVERSED AND REMANDED.

Realtor seeks supervisory relief from a denial of its motion for summary judgment in realtor's suit to enforce a judgment against community property. The narrow issue presented is whether *Kirchberg v. Feenstra*, 609 F.2d 727 (5th Cir. 1979), affirmed, 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981), applies to this case to preclude enforcement of the judgment against the wife's half of the community property.

The *Kirchberg* decision, which struck down the provision of the Louisiana Civil Code designating the husband as head and master of the community and which gave the husband the exclusive right to administer the community estate, was rendered on December 12, 1979. Realtor's judgment was obtained on November 12, 1979 and was obtained

upon default of a promissory note secured by a mortgage on community property. The note and mortgage were executed solely by the husband some years prior to 1979.

After our review, we find the *Kirchberg* court did not intend its decision to apply to notes and mortgages executed prior to its decision since the court specifically stated that it was to be applied prospectively. See also *Ailstock v. Hamiter*, 420 So.2d 500 (La. App. 2d Cir. 1982). Consequently we find *Kirchberg* does not apply to these facts and relator is entitled to enforce its judgment against both the husband and wife's half of the community property.

Accordingly, the judgment of the trial court denying relator's motion for summary judgment is hereby reversed and the case is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX, Item C

JOHN R. PERTUIT,
ET AL

VERSUS

AMERICAN BANK

29th JUDICIAL
DISTRICT COURT

PARISH OF
ST. CHARLES

NO: 29-222
DIVISION "C"

FILED: January 7, 1986

Dy: Clerk: Lena C

FIRST AMENDING AND SUPPLEMENTAL PETITION

The first amending and supplemental petition of John R. Pertuit, et al, plaintiffs in the above entitled cause, respectfully represents that the plaintiffs desire to amend and supplement their original petition filed herein on the 30th day of July, 1985, in the following respects:

1.

By amending and supplementing paragraph V. as follows:

V.

Petitioners aver that the American Bank obtained a judgment against community property standing in the name of both John R. Pertuit and Audrey Pertuit as a result of a mortgage taken on the property which was signed by John R. Pertuit only. The mortgage was executed in accordance with former Civil Code Art. 2404, which was declared unconstitutional by the United States Fifth Circuit Court of Appeals in *Kirchberg v. Feenstra*, (609 Fed. 2nd. 727, Ct. of Ap. 5th CIr. - 1979), therefore, the judgment based on the mortgage taken pursuant to the former

C.C.P. Art. 2404 is null and void with respect to the community property referred to herein.

WHEREFORE, petitioners, John R. Pertuit and Audry Pertuit, reiterating the prayer of their original petition as set forth at length herein pray that their first amending and supplemental petition be amended and supplemented in the particulars set forth above and that after due proceedings had, there be judgment in their favor and against the defendant, American Bank.

/s/ R. O. Lewis

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PLEASE SERVE:
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thru their attorney of record:
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